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No. 06-112

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the First Circuit

BRIEF AMICI CURIAE OF International Council of Shopping Centers (ICSC); National Association of Industrial and Office Properties (NAIOP); Real Estate Roundtable (RER) In Support of Petitioners

JOHN J. DELANEY
Counsel of Record

LINOWES AND BLOCHER LLP
7200 WISCONSIN AVENUE
SUITE 800
BETHESDA, MARYLAND 20814
(301) 961-5115

Attorneys for *Amici Curiae*

(Additional Counsel Listed on Inside Cover)

Of Counsel:

Betsy R. Laird
International Council of Shopping Centers
1399 New York Avenue, N.W.
Suite 720
Washington, D.C. 20005
(202) 626-1400

Reba A. Raffaelli
National Association of Industrial and Office Properties
2201 Cooperative Way
3rd Floor
Herndon, VA 20171-3034
(703) 904-7100

Roger Platt
The Real Estate Roundtable
1420 New York Avenue, N.W.
Washington, D.C. 20005
(202) 639-8400

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INTERESTS OF THE AMICI CURIAE[1]

Written consent has been filed with the Clerk of the Court allowing the amici listed herein to submit this brief in support of the Petitioners.

The *amici* are a coalition of trade associations whose membership shares a common interest in the protection of private property rights safeguarded by the Takings Claims of the Fifth Amendment. Accordingly, the *amici* are concerned with any judicial decision that calls into question the "just compensation" remedy available under the U.S. Constitution to its members. In this case, their interest is heightened by the basic, fundamental, jurisdictional issue at play: When their members suffer an uncompensated taking as a result of government actions, can they ever vindicate those types of federal constitutional claims in a federal court?

Founded in 1957, the International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. Its more than 61,000 members in the U.S., Canada, and more than 80 other countries represent owners, developers, retailers, lenders, and other professionals as well as academics and public officials. Shopping centers are America's marketplace, representing economic growth, environmental responsibility, and community strength. ICSC supports strong protections for property owners. Indeed, ICSC could scarcely exist

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned Counsel of Record certifies that he authored this Brief in its entirety; that it was not written in whole or in part by counsel for a party; and that no one, other than the amici curiae, has made a monetary contribution to its preparation or submission.

without the certainty provided by property rights and property-related contractual rights.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading trade association for developers, owners, investors and other professionals in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP comprises 13,000+ members in 52 North American chapters. NAIOP provides communication, networking and business opportunities for all real estate professionals; provides a forum for continuing education; and promotes effective public policy, through its grassroots network, to create, protect and enhance property values.

The Real Estate Roundtable ("RER") is the organization that brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms, with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. Collectively, RER members hold portfolios containing over 3.5 billion square feet of developed property valued at more than $300 billion. The RER has long advocated that the implementation of local, state and federal laws be more sensitive to the constitutional property rights of private citizens, and that adequate remedies be available when those rights are violated.

SUMMARY OF ARGUMENT

This case is about federal court access and procedural fairness. The Court is not asked to decide whether Henry Torromeo and MDR Corporation ("Petitioners") must be compensated for the taking that is alleged, but simply whether that issue is ripe for resolution in federal court.

The Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), was clear in stating that Fifth Amendment takings claimants who were required to use "state procedures" to determine whether compensation was available, and were denied relief, could then ask a federal court to validate their federal takings claim. Nothing in *Williamson County* warranted the conclusion that *only state courts* could be utilized as the forum for determining whether an adequate post-deprivation remedy for a property loss exists under state law. Federal courts routinely become involved in reviewing actions of local governments in other constitutional contexts, and the treatment of Fifth Amendment takings claims should be no different. When local land use decisions are challenged on takings grounds, no basis exists to exclude federal courts from determining whether compensation has been paid, or examining whether state procedures for obtaining compensation from local governments are adequate or have been exhausted.

However, initial expectations arising from *Williamson County* were quickly dashed as zoning bodies and lower courts across the country abused or misapplied the Court's decision by fabricating additional obstacles, such as ripeness, claim preclusion and issue preclusion, to prevent judicial review of the merits of a takings claim. These actions have caused concrete deprivations of property rights. Clearly, the *Williamson County* Court did not intend that the doors of the federal courthouse be slammed shut only on plaintiffs alleging a taking under the Fifth Amendment, while (1) municipal defendants in such cases retain the option of defending takings claims in either federal or state court, *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), and (2) plaintiffs with other

constitutional claims are allowed reasonable and immediate access to the federal courts.

As a result of the Court's recent decision in *San Remo Hotel, L.P. v. San Francisco City and County*, 545 U.S. 323 (2005), virtually all Fifth Amendment takings claims must be brought in state courts. Expectations still lingering from *Williamson County* that property owners could validate their Fifth Amendment takings claims in federal court were extinguished. Significantly, four concurring Justices in *San Remo* suggest convincingly that *Williamson County* may not have been correctly decided; that its requirement that takings claimants must seek compensation in a state court before bringing a federal takings claim in federal court may be only a prudential requirement in the first place; and that while state courts are competent to adjudicate federal takings claims, there is no basis why such claims should be "singled out to be confined to state court". 545 U.S. at 342 (Rehnquist, C.J., concurring). *Williamson County*'s ripeness requirement cannot be reconciled with *San Remo*, nor can it be reconciled with the laws of issue and claim preclusion.

Additionally, the Court of Appeals applied a "shocks the conscience" standard of review in this Fifth Amendment deprivation case. A proper understanding of the extensive power of local governments over private property and the pervasive impact of such power upon constitutionally protected property rights would strongly suggest that the shocks the conscience standard is inappropriate in substantive due process review of local government decisions in land use cases. The lower federal courts are split on this issue.

For these reasons, it is imperative that certiorari be granted.

ARGUMENT

I. IN LIGHT OF THE COURT'S DECISIONS IN *WILLIAMSON COUNTY* AND *SAN REMO*, ONLY STATE COURTS CAN HEAR FEDERAL TAKINGS CLAIMS UNLESS THE RESPONDENT LOCAL GOVERNMENT OPTS UNDER *CITY OF CHICAGO* TO REMOVE THE CLAIM TO FEDERAL COURT.

A. *Williamson County* Assured Ultimate Disposition of Federal Takings Claims in Federal Court.

Before the Court decided *San Remo*, it was widely believed that the Court in *Williamson County* contemplated that citizens alleging Fifth Amendment regulatory takings claims against a local government in a federal court could *return* to the federal court after ripening their claim by seeking compensation "through the procedures the state has provided" for such purposes, 473 U.S. at 194. In *Williamson County*, the applicable state procedure was an action for inverse condemnation under Tennessee law, 473 U.S. at 196. The Court expressly held that a property owner "cannot claim a violation of the Just Compensation Clause" *until* it has used the [state's] procedure and been denied just compensation." 473 U.S. at 195 (emphasis supplied). The Court repeatedly stated that the owner's claim was "premature" and thus "not yet ripe" for adjudication in a federal court "until" the state "fails to provide adequate compensation for the taking."[2]

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[2] *Williamson County* at 195. In describing the Justices clear intent that the claimant could return to the federal court, the Court's opinion and concurring opinion used the word "premature" six times (at 473 U.S. 185, 195, 197, 199, 200, and 201) and "until" five times (at 186,

Williamson County left little doubt that a takings claim that is unripe for adjudication in a federal court could later be ripened for future adjudication in that court "after disposition in the state court."[3] Its phraseology created an "expectation…that an unsuccessful state plaintiff will then return to federal court."[4]

Practitioners and scholars have shared this view.[5] Unfortunately, to the consternation of property owners, attempts to follow *Williamson County* have not succeeded. This has been due primarily to the confusion and chaos arising in lower federal courts when weighing *Williamson County's* directives against doctrines of claim preclusion (res judicata) as in the instant case, and issue preclusion (collateral estoppel).[6]

As compellingly described in the Petition For A Writ of Certiorari ("Petition"), the result has been what is often

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195, and 197). The phrase "not yet ripe" was used both in the main opinion (473 U.S. at 194) and in Justice Stevens concurring opinion (473 U.S. at 203).

[3] Madeline J. Meacham, *The Williamson Trap*, 32 THE URB. LAW. 239, 249 (2000).

[4] *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004).

[5] *See, e.g.*, J. David Breemer, *You Can Check Out But You Can Never Leave: The Story Of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims To State Courts Under a Rule Intended to Ripen The Claims For Federal Review*, 33 B.C. Envtl. Affairs Law Rev. 247, 283-284, n. 260 and accompanying text (2006); hereinafter "*You Can Check Out But You Can Never Leave.*"

[6] *See* generally Michael Berger, *Choice of Forum: A Bit of Ripeness History*, ALI-ABA Land Use Institute Vol. II, Page 1407 (2006); Michael Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 THE URB. LAW. 671 (2004).

described as "the Williamson Trap."[7] Where as in this case, property owners follow *Williamson County* by seeking compensation in a state court in order to ripen their federal claim and lose, that claim has instead been entirely extinguished. Just as a federal takings claim filed "before state court litigation" is "too early," a federal claim brought "after state litigation" [as here] is too late.[8]

The reaction of federal appellate courts to this phenomenon has ranged from sympathetic rejection of the property owners' efforts to gain a hearing on the merits of their federal claims, to almost callous disregard for their predicament. For example in *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003), cert. denied 540 U.S. 823 (2003), the Court of Appeals acknowledged that Mr. Kottschade's arguments are "justly" stated; that the combination of the state remedies exhaustion requirement and the barriers to federal jurisdiction thereafter facing compliant landowners may be "anomalous;" but concluded that whether and how the problem should be addressed, "is for the Supreme Court to say, not us." *Kottschade*, at 1041.[9]

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[7] Petition, pg. 8.

[8] Petition, pg. 8, citing Madeline J. Meacham, *The Williamson Trap, supra*, Footnote 3. See also: Berger, *Choice of Forum: A Bit Of Ripeness History, supra*, Footnote 6.

[9] Similarly, in *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n.4, (10th Cir. 1998), the court in applying preclusion doctrines to bar a takings claim, stated that *Williamson County's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . . It is difficult to reconcile the ripeness requirement of *Williamson County* with the laws of [issue and claim preclusion]. *Wilkinson*, 142 F.3d at 1325, n.4.

Indeed, this was a problem that the distinguished Professor Daniel R. Mandelker envisioned almost a decade ago:

> [E]ven if the property owner strictly adheres to *Williamson County*, her failure to raise a *federal* constitutional claim in *state* court could destroy her chances of ever having a federal judge address the Fifth Amendment claim. I do not think that property owners should be forced to litigate federal takings claims in State court, yet this is the ironic effect of the synergy between ripeness and res judicata.[10]

In *Dodd v. Hood River County*, 59 F.3d 852, 860-861 (9th Cir. 1995) ("*Dodd I*"), the Court of Appeals rejected the County's claim preclusion argument, stating:

> [To] hold that a takings plaintiff must first present a Fifth Amendment claim to the state court system ... would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revoluntionary concept and draconian result.

However, in a subsequent appeal by the Dodds, *Dodd v. Hood River County,* 136 F.3d 1219, 1224-1228 (1998) (emphasis supplied) (*Dodd II*), the Ninth Circuit sprung the *Williamson County* trap by holding that while the *Dodds* could reserve their claim for federal court the reservation doctrine did not enable them to "avoid preclusion of *issues* actually litigated" in the state court.

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[10] Daniel R. Mandelker, Testimony Before House Judiciary Committee, Sept 23, 1997, 31 THE URB. LAW. 234, at 251 (1999).

In *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 127, 130 (2d Cir. 2003), the Court of Appeals disagreed with the Ninth Circuit's decision in *Dodd II*, and attempted to implement what it believed was the clear intent of *Williamson County*. After finding that claim preclusion was inapplicable because *Santini* could not have brought a Fifth Amendment takings claim in an earlier state court action, the court declined to apply issue preclusion, stating:

> It would be both ironic and unfair if the very procedure that the Supreme Court required *Santini* to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded *Santini* from ever bringing a Fifth Amendment takings claim. (342 F.3d at 130).

However, the *San Remo* Court resolved the conflict between *Santini* and *Dodd II* in favor of the more tortured logic of *Dodd II*.[11]

Other federal courts have expressed few qualms about dismissing federal takings claims for lack of jurisdiction even in cases where the property owners filed their initial suit in state court as directed by *Williamson County*, only to be forced into a federal court by the local governments' removal motions. *See e.g., Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003). The Amici share the concerns of the Petitioners (Petition, page 16) that such practices are unfair, far beyond the pale, and require intervention by the Court.

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[11] *San Remo*, 545 U.S. at 326-327.

The "right of access to the courts" has been described by this Court as a "fundamental right guaranteed by the Constitution." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). Surely, this cannot mean that for citizens asserting Fifth Amendment takings claims, this fundamental right extends only to review by state courts. Yet that is exactly what has happened in the wake of *Williamson County* and its progeny in lower federal courts. Federal judges routinely cite *Williamson County's* ripeness requirements in rejecting takings claims.[12]

Three decades ago, in *England v. Louisiana State Board of Medical Examiners et al,* 375 U.S. 411, 415 (1964), Justice William Brennan stated:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.

Federal judges should review constitutional challenges to local government actions in the land use area, just as they review local government infringements upon other privileges in the Bill of Rights.

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[12] This is due primarily to the fact that they interpret *Williamson County's* "state procedures" language as requiring landowners to first litigate their takings claims in state courts. As noted by Chief Justice Rehnquist in his concurring opinion in *San Remo*, (545 U.S. at 340), discussed *infra* in Argument IB, this is not at all clear.

B. *San Remo* Is Inconsistent With *Williamson County's* Promise of Federal Court Adjudication of Fifth Amendment Takings Claims.

San Remo drastically modifies *Williamson County's* promise of ultimate federal court adjudication of takings claims. The Court characterizes the Hotel's claimed right "right to vindicate [its] federal claims in a federal forum" as a mere "assumption," 545 U.S. at 336, and in so doing has created additional confusion. As discussed in Argument IA, *Williamson County* has been understood to mean that despite the requirement that a takings claimant first ripen its claim in state court *before* it may proceed in a federal court, the federal court would remain available for ultimate adjudication of such a claim. To the contrary, *San Remo* holds that "issues actually decided in valid state court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court". 545 U.S. at 336.[13] Further, *San Remo* states that *Williamson County's* requirement that "aggrieved property owners must seek compensation through the procedures the state has provided for doing so does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that in the alternative the denial of compensation would violate the Fifth Amendment of the Federal Constitution." 545 U.S. at 338.

San Remo has been heavily criticized. For example, its statement that there is "scant precedent" for litigation in

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[13] In their state court complaints the Petitioners made only a single reference to the Federal Takings Clause. They never had an opportunity under New Hampshire law and First Circuit precedent to litigate their Fifth Amendment claim in state court. *See* Petition, pgs. 3-4, 13-14, and particularly 19-20.

federal district courts of takings claims arising from actions of state agencies (545 U.S. at 339) is strongly questioned by one commentator:

> "Between June 26, 1978--the date the Court decided *Penn Central Transportation Co. v. New York City* (438 U.S. 104) which provided the modern regulatory takings test--and June 28, 1995--the date the Court issued *Williamson County*--there were approximately 141 federal district court cases involving federal takings claims against regulation. By contrast, there were just 109 similar state court cases. . . In the period between 1992--the year *Pennsylvania Coal v. Mahon* (260 U.S. 393) was decided--and 1978, there were approximately 174 more instances of litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's 'takings clause'."[14]

The commentator concludes that, "thanks to *San Remo*, the irredeemably flawed and unnecessary state procedures requirement has conspired with preclusion to make federal claims for just compensation federally homeless."[15]

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[14] Breemer, *You Can Check Out But You Can Never Leave*, *supra*, Note 5, 33 B.C. Envtl. Affairs Law Rev. 247, at 286-287. Similarly *San Remo's* observation that "most" Supreme Court takings cases have arisen from state courts since 1978 is challenged by the assertion that the Court has taken 19 major cases arising from federal district courts during this period, compared to only 14 from state courts. *Id.* For an extended listing of other articles critical of *Williamson County's* state compensation procedures requirement, *see* p. 248, Note 3 of Mr. Breemer's treatise.

[15] *Id.* at 299. *See also* Berger and Kanner, *supra*, Note 6.

The late Chief Justice William Rehnquist, joined by Justices O'Connor, Kennedy and Thomas, wrote a concurring opinion in *San Remo* questioning whether *Williamson County* was correct in demanding "that once a government entity has reached a final decision regarding a claimant's property, the claimant "must" seek compensation in a state court before a federal takings claim in federal court". 545 U.S. at 340. The concurring opinion suggests that this may be "merely a prudential requirement," and that neither "constitutional nor prudential principles" required the claimant to embark upon such a course. 545 U.S. at 340-341. Moreover the concurring opinion questions why authority over federal takings claims should be handed to state courts, based simply on their "relative familiarity" with local land use decisions and proceedings, while allowing plaintiffs who challenge municipal land use regulations based upon the First Amendment or the Equal Protection Cause to "proceed directly to federal courts". 545 U.S. at 341. The concurring opinion notes that *Williamson County's* "state litigation rule has created some real anomalies" justifying revisiting the issue. One of these is the *San Remo* ruling that litigants who do go to state court to seek compensation "will likely be unable later to assert their federal takings claims in federal court." 545 U.S. at 342. The concurring Justices then identify the central problem:

> *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound. . . and would apply to any number of federal claims...But that principle does not explain why federal takings claims in

> particular should be *singled out to be confined to state court*, in the absence of any asserted justification or congressional directive. 545 U.S. at 342 (emphasis supplied).

Chief Justice Rehnquist thereupon acknowledges that he joined the opinion of the Court in *Williamson County*, but that further reflection and experience have led him to think that:

> [T]he justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts. 545 U.S. 342.

The Amici respectfully submit that the Petitioners have presented Chief Justice Rehnquist's "appropriate case" to the Court.

II. THE COURT'S DECISIONS IN *DOLAN* AND *LINGLE* INDICATE THAT THE "SHOCKS THE CONSCIENCE" STANDARD SHOULD NOT APPLY IN SUBSTANTIVE DUE PROCESS REVIEWS OF LAND USE DECISIONS.

In response to the Petitioners' substantive due process claim, the Court of Appeals in *Torromeo, et al. v. Town of Fremont, New Hampshire*, 438 F.3d 113, 118 (1st Cir. 2006), held that there are "limits" when such claims arise from "land use disputes" and thus, the Petitioner's claim that the Town's actions have caused them harm was not enough to "shock the conscience" of the court so as to rise

to the level of a "constitutional deprivation." (*Id.*)[16] As noted in the Petition, lower federal courts are applying different and conflicting due process standards to deprivations of property. Several circuits – now joined by the First Circuit – are using the shocks the conscience standard without explaining why it is more appropriate than the "rational relationship" test. (Petition, pp. 23-27).

The Amici agree that there is conflict among the circuits which needs to be resolved by the Court, and submit that the shocks the conscience standard should have no place in evaluating deprivation of property claims arising from local land use decisions. Local governments have been deeply involved in land use planning and regulation for nearly a century, before the Court's first decisions upholding local zoning ordinances against due process challenges, and well before the standard planning enabling acts in the 1920s.[17] This is far longer than their counterparts in the state and federal governments whose meaningful experience didn't begin until the 1970s following passage of federal environmental laws. An extensive, well-developed body of jurisprudence regarding zoning, subdivision and numerous related areas of land use is available to the courts.[18] To this

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[16] As stated by the Petitioners, this Court has never applied the shocks the conscience standard in a property rights case, but did use it in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), a far cry from the case at bar, which held that a police officer involved in an automobile accident while engaged in a hot pursuit did not violate the due process right to life of the decedent.

[17] *See e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Daniel R. Mandelker, LAND USE LAW, 5th Ed., Sections 3.01-3.05, Lexis-Nexis 2003.

[18] Compare e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 390-391 (1994) (where the Court relied upon decades-old precedents from several

day, primary responsibility for *land use planning and regulation* remains vested in local governments. Each and every week local governments take action on countless numbers of *building permits*, still the Holy Grail of all development approvals. More than any other level of government, local governments usually have the final say on how a specific parcel of land will ultimately be developed and used. They wield enormous power and have the most pervasive impact upon property rights. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), exemplifies how this power can be and often is abused.[19] While the property owners in *City of Monterey* ultimately prevailed, the land use labyrinth they were forced to navigate is by no means unique.[20]

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states in developing the "rough proportionality" standard for regulatory exactions), to *Rapanos, et. al. v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006) (where federal agency interpretations of "waters of the United States" and "navigable waters" continue to defy consensus).

[19] In *City of Monterey*, the developer submitted 19 different site plans and numerous applications over a period of years in a futile effort to obtain approval. Nine years had elapsed between submission of the first plan to a lower court's decision that the claim was ripe, without ever reaching the merits. Eight more years of litigation on the merits followed before the Supreme Court reviewed the case.

See also Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J. L. & Pol'y 195 (2000). Mr. Cobb was, for many years, Staff Counsel for the American Planning Association and was also Editor of LAND USE LAW AND ZONING DIGEST.

[20] The following cases involve multiple submissions of development plans, and lengthy agency reviews (often taking many years) culminating in dismissal of court challenges on ripeness grounds. *Id.* at 7-21: *Forseth v. Village of Sussex*, 20 F.Supp.2d 1267, 1272 (E.D. Wisc. 1998), *aff'd in part, rev'd in part*, 199 F.3d 363, 366 (7th Cir. 2000); *Good v. United States*, 39 Fed. Cl. 81, 101-103 (1997), *aff'd*,

In view of the devasting impact that local zoning and permitting actions can have on basic property rights, the hostile and elitist attitude exhibited by some federal courts when reviewing constitutional claims arising from these actions is astonishing.[21] The message conveyed is that the myriad local land use decisions — the decisions that most often deprive citizens of their property — are not worthy of federal constitutional review, no matter how implausible.[22]

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189 F.3d 1355 (1999), *cert. denied*, 529 U.S. 1053 (2000); *2BD Ltd. P'ship v. County Comm'rs for Queen Anne's County*, 896 F.Supp. 518 (D.Md. 1995), *aff'd following remand*, 162 F.3d 1158 (4th Cir. 1998); *Schulze v. Milne*, 849 F.Supp. 708, 709 (N.D.Cal. 1994), *aff'd in part, rev'd in part on other grounds*, 98 F.3d 1346 (9th Cir. 1996); *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Kaiser Development Co. v. City and County of Honolulu*, 649 F.Supp. 926, 940, 941 n. 19, 942 n. 21 (D. Hawaii 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991). State courts often emulate federal courts regarding finality and ripeness. A California state case typifies the situation that landowners can confront when seeking development approvals from state and local official, *e.g.*, *Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158 (Ct. App. 1994).

[21] For example, even though constitutional property rights issues were at stake, one appellate court proclaimed that "federal courts are not boards of zoning appeals." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994). Another, in dismissing a takings claim, was concerned that it be perceived as "the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). Yet another characterized the takings claim before it as merely "a garden variety zoning dispute dressed up in the trappings of constitutional law." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

[22] For example, in *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549, certiorari denied, (2000), the owners of a 58-unit hotel claimed that the imposition of a $600,000 "replacement fee" as a condition of approval to convert 24 residential units in the hotel to "tourist units" was a violation of the essential nexus and

These attitudes encourage agencies to make arbitrary decisions and manipulate the process. Intimidated applicants are often ping-ponged from agency-to-agency, or between agency and courts in a futile quest for a "final" decision that is "ripe" for judicial review. This is inconsistent with prior rulings of the Court that local governments are not immune from liability in 42 U.S.C. Section 1983 actions such as those in the instant case.[23] The federal courts' avoidance of takings claims is a particular subject of analysis.[24]

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rough proportionality requirements of *Nollan* and *Dolan*. The state appellate court found no such violation, holding that the fact that the planning commission "might have granted the permit upon payment of $600,000 does not make its refusal to issue the permit into a taking." 529 U.S. at ___, 120 S. Ct. 2t 1551 . Justices Scalia, Kennedy and Thomas in dissent found this reasoning to be "so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal," and that "there is reason to believe that this may be more than a local and isolated phenomenon." *Id.* (citations omitted).

[23] *See, Owen v. City of Independence*, 445 U.S. 622 (1980). In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 707 (1999), the Court rejected this notion: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim …."

[24] *See*, Notes 5 and 6 *supra*. *See also, e.g.*, Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVT'L L. 91 (1994); Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. WESTERN L. REV. 1 (1992); Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners*, 2 HOFSTRA PROP. L.J. 73 (1988); J. Delaney and D. Desiderio, *Who Will Clean Up The 'Ripeness Mess'?*

If the unique power of local governments over the use of land and the abuses thereof were properly understood, few courts would apply the "shocks the conscience" standard in a substantive due process analysis of a local land use decision. Moreover, the Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), has already spoken in part on this issue. *Dolan* articulated an elevated standard, the "rough proportionality," test (512 U.S. at 391), when regulatory conditions or exactions are attached to a development approval, while placing the burden of proof upon the government – not the property owner – to show that rough proportionality existed between the exaction and the burden imposed by the development, 512 U.S. at 391.

Further, *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 544 (2005), clarified that the "substantially advances a legitimate state interest test "espoused in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) ("*Agins Prong I*") was doctrinally untenable in takings cases. The Court further ruled that *Dolan* and its companion case, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), "are better understood as involving a special application of the 'doctrine of unconstitutional conditions,'" (544 U.S. at 547), namely that the government may not require a person to give up a constitutional right when property is taken for a public use "in exchange for a discretionary benefit conferred by the government where the benefit has little or no relation to the property," 544 U.S. at 457.

Agins Prong I was originally promulgated based on *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a due

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A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse. 31 THE URB. LAW. 195, 203-204 (Spring, 1999).

process case. *Lingle* suggests that due process standards (including a means-ends test) rather than takings tests will be applied in future cases involving unconstitutional conditions attached to development approvals, (544 U.S. at 542). In such cases, the rough proportionality test might be appropriate. Again there would appear to be no need or justification for applying the "shocks the conscience" standard of review. Moreover, *Lingle* characterized both *Nollan* and *Dolan* as involving dedications of property "so onerous that outside the exactions context they would be deemed *per se* physical takings" (544 U.S. 547), thus obviating the need for substantive due process review, with or without the "shocks the conscience" standard.

In summary as noted by the Petitioners, notwithstanding the appellate court's imposition of a harsh "shocks the conscience" standard of review in this Fifth Amendment deprivation of property rights case, no national standard yet exists. Thus, clarification by the Court is much needed.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. DELANEY
Counsel of Record

LINOWES AND BLOCHER LLP
7200 Wisconsin Avenue - Suite 800
Bethesda, MD 20814-4842
(301) 961-5115
Fax (301) 654-2801
E-mail:jdelaney@linowes-law.com

Attorneys for *Amici Curiae*